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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 80-5119

ORIGINAL COPY

JOSEPH MULLIGAN,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

Never having been presented to any court below, is the issue of the effectiveness of Petitioner's trial counsel properly before this Court?

II.

Were the second and seventh statutory aggravating circumstances properly charged and applied in this case?

STATEMENT OF THE CASE

Petitioner, Joseph Holcombe Mulligan, was indicted by the Muscogee County, Georgia, grand jury for the murders of Patrick A. Doe and Marian Jones Miller, and for theft by taking. Following his jury trial, Mulligan was found guilty on all counts and sentenced to death for each murder and to thirty days for the theft by taking.

Mulligan's convictions and death sentences were appealed to the Supreme Court of Georgia in Mulligan v. State, 245 Ga. 266, 264 S.E.2d 204 (1980). The evidence, set forth in detail in the appellate decision, showed that Mulligan offered his coindictee, Timothy Helms, $1,000.00 to drive Mulligan to Columbus, Georgia, to "ice somebody." The two registered at a Columbus hotel under false names; the following afternoon they visited Patrick A. Doe, an army captain at Fort Benning and the Petitioner's brother-in-law. As the Supreme Court of Georgia recounted:

> That evening, with the appellant and Helms sitting in the back seat (the appellant seated directly behind the driver's seat), Captain Doe drove to the house of Marian Jones Miller, the captain's girlfriend, to pick her up for a party. When Captain Doe left the car to get Ms. Miller, the appellant announced to Helms that he would "do it in the next two blocks."
>
> Following Captain Doe's return to the driver's seat and shortly after the car had begun to move again, the appellant held a .38 special automatic in a .45

> frame, which the appellant had earlier borrowed from the captain, to the captain's head. The appellant fired once. He then ordered Helms to grab the now-abandoned steering wheel, but Helms was unable to do so before the car had struck both a stop sign and a mailbox.

245 Ga. at 266-67. Evidence also showed that Ms. Miller begged for help after having been shot by Mulligan. Mulligan's response to the woman's pleas was to "put the gun in her back and [shoot] her again and [say], 'Shut up, woman.'" 245 Ga. at 882.[1/]

The Supreme Court of Georgia vacated the death penalty imposed for Count 1, the murder of Captain Doe, because the evidence did not support either the statutory aggravating circumstance charged [Ga. Code Ann. § 27-2534.1(b)(4)] or the statutory aggravating circumstance found by the jury [Ga. Code Ann. § 27-2534.1 (b)(7)]. The court directed a life sentence be imposed. The second death sentence, based upon two statutory aggravating circumstances [Ga. Code Ann. § 27-2534.1(b)(2) and (7)] was affirmed.

If necessary to address adequately any issue raised in the petition, additional facts will be recounted in the remaining portion of this brief.

[1/] The Supreme Court of Georgia reconsidered their opinion in Mulligan in light of this Court's opinion in Godfrey v. State, ___U.S.___, 100 S.Ct. 1759 (1980), and in an addendum reaffirmed the death penalty imposed for the murder of Ms. Miller. 245 Ga. 881, ___S.E.2d___(1980).

REASONS FOR NOT GRANTING THE WRIT

I. NEVER HAVING BEEN PRESENTED TO ANY COURT BELOW, THE ISSUE OF THE EFFECTIVENESS OF PETITIONER'S TRIAL COUNSEL IS NOT PROPERLY BEFORE THIS COURT.

As Petitioner indicates at the outset of his petition, the issue of ineffective assistance of trial counsel is raised for the first time in this Court. For good reasons, this Court "has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions. . . ." Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). See also Tacon v. Arizona, 410 U.S. 351, 352 (1973). The reasons for the rule are grounded in jurisdiction, comity, and the necessity of the full development of issues presented to the Court.

Petitioner urges this Court to review the record and transcript, find plain error in the representation afforded Petitioner, and adopt a nationwide standard of effectiveness for criminal counsel. Vachon v. New Hampshire, 414 U.S. 478 (1974), cited by Petitioner as one instance when this Court has found plain error from the record on an issue not previously raised, involved a finding of a complete lack of evidence to support a necessary element of the crime for which Vachon was convicted. The issue Petitioner Mulligan seeks to present may not be disposed of so readily. Petitioner has available the forums of state and federal habeas corpus courts to present the issue of ineffective assistance of counsel as well as any other he deems appropriate. Petitioner would have this Court decide the issue of ineffective assistance of counsel with no testimony from the trial counsel explaining why he did or did not perform any of the services complained of.

This Court should not be required to dispose of a crucial constitutional question on such a scant record.

Respondent can find no decision of this Court finding plain error in the assistance of counsel at this stage of appellate proceedings. The rule in the Fifth Circuit is that:

> . . . claims of inadequate representation cannot be determined on direct appeal where such claims were not raised [in the court below] and there has been no opportunity to develop and include in the record evidence bearing on the merits of the allegations.

United States v. Stephens, 609 F.2d 230, 234 (5th Cir. 1980). Accord United States v. Brown, 591 F.2d 307 (5th Cir. 1979); United States v. Rodriquez, 582 F.2d 1015 (5th Cir. 1978).

Petitioner should be required first to present this issue to an appropriate forum in order to develop the issue fully for this Court's consideration. The first allegation of error presents no reason for granting the writ.

II. THE SECOND AND SEVENTH STATUTORY AGGRAVATING CIRCUMSTANCES WERE CHARGED AND APPLIED PROPERLY IN THIS CASE.

The second issue presented is a dual one: (1) was Ga. Code Ann. § 27-2534.1(b)(7) charged and applied properly under the facts of this case, and assuming it was not, (2) can the death penalty be based upon a second statutory aggravating circumstance found by the jury?

In fact, the trial court correctly charged and the evidence amply supported both statutory aggravating circumstances. Indeed, the Supreme Court of Georgia reexamined its decision immediately after this Court's decision in Godfrey v. State, supra. That court found that "the evidence supports a reasonable trier of fact's finding, beyond a reasonable doubt, that the appellant's murder of Ms. Miller was 'outrageously or wantonly vile, horrible or inhuman in that it involved torture and depravity of mind.'" 245 Ga. at 881-82. The evidence showed the first shot, and possibly the first three shots, only wounded Ms. Miller; having been shot, she begged for assistance saying, "Help me, I'm hurt, please help me." 245 Ga. at 882. Ms. Miller was shot in the left forearm, the left shoulder, the right upper arm, and the midportion of the back of the skull; the exit wound of the latter shot was the right eye. As the state supreme court found, "[t]his testimony clearly demonstrates that the fatal shot to the skull was not the first shot fired and that Ms. Miller suffered serious physical abuse prior to death." Id. (emphasis in original). The facts clearly evidence torture to the victim as well as depravity of mind of the defendant.

Petitioner attempts to bring his case under the holding in Godfrey v. Georgia, supra, because of alleged error in the application of Ga. Code Ann. § 27-2534.1(b)(7). Contrary to Petitioner's assertions, Godfrey mandates this Court's denial of the present petition.

Section (b)(7) provides for imposition of the death penalty to a person convicted of murder if the evidence shows the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." This Court has held that the code section is not unconstitutional on its face. Gregg v. Georgia, 428 U.S. 153 (1976). In Godfrey, this Court found that the statute had not been applied constitutionally to the facts in that case. It was determined that the deaths were instantaneous and involved neither torture nor aggravated battery.

Petitioner contends that although he shot Ms. Miller four times, at least one of which shots was fired as she was pleading for help, she was not "tortured in the manner referred to in Godfrey." (Petitioner's brief at 51). As this Court is aware, after the decision in Godfrey v. Georgia, supra, the Supreme Court of Georgia considered at length the proper application of § (b)(7). Hance v. State, ___Ga.___, ___S.E.2d___(Case No. 36012, decided June 24, 1980). Relying in part on this Court's opinion in Godfrey, the Hance court held that "[t]orture occurs when the victim is subjected to serious physical abuse before death. . . . Torture also occurs when the victim is subjected to an aggravated battery as hereinabove defined." (slip opinion at 7). The court further found that "[e]vidence of psychological abuse by the defendant to the victim before death where it is shown to have resulted in severe mental anguish to the victim in anticipation of physical harm may amount to serious physical abuse

(i.e., torture of the victim), and also will support a finding of depravity of mind of the defendant." (slip opinion at 8).

The court in Hance even used Petitioner's case to demonstrate the appropriateness of § (b)(7):

> Insofar as aggravated battery and torture are concerned, only facts occurring prior to death may be considered. The death of a victim who dies instantaneously with little or no forewarning does not involve torture or aggravated battery. . . . Mulligan v. State, 245 Ga. 266 (264 SE2d 204) (1980); i.e., only facts showing aggravated battery or torture (as hereinabove defined), which are separate from the act causing instantaneous death, will support a finding of torture or aggravated battery. . . .

(slip opinion at 8). Plainly, under this Court's opinion in Godfrey and the Georgia Supreme Court's explication of § (b)(7)'s application in Hance, the seventh statutory aggravating circumstance was correctly charged, amply supported by the evidence, and appropriately found by the jury.

Finally, it is beyond dispute that the murder of Ms. Miller was committed while the offender was engaged in the commission of another capital felony, to wit: the murder of Captain Doe. Thus, two statutory aggravating circumstances existed and were found by the jury. The Supreme Court of Georgia has found in numerous cases that where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death based

thereon. Gates v. State, 244 Ga. 587, 599, 261 S.E.2d 349 (1979); Gregg v. State, 233 Ga. 117, 127-28, 210 S.E.2d 659 (1974). See also Gregg v. Georgia, 428 U.S. 153, 161-62 (1976).

There is no doubt that the facts of the case authorize a finding of both the second and seventh aggravating circumstances as previously set forth in this brief; nevertheless, even if one were assumed to be erroneously found, the death sentence would still be appropriate. The second reason asserted provides no basis for granting the writ.

CONCLUSION

No sufficient reasons having been presented, the petition for writ of certiorari should be denied.

Respectfully submitted,

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